IN THE

Supreme Court of the United States

October Term, 1961

No. 390

JOSE MARIA GASTELUM-QUINONES, *Petitioner*

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia denying petitioner's motion for a preliminary injunction to restrain his imminent deportation.

OPINION BELOW

The court below issued no opinion. Its judgment is appended hereto as Appendix A. Appended hereto as Appendix B is the opinion of the Court below in a prior litigation involving the petitioner. This opinion is reported at *Gastelum-Quinones* v. *Rogers*, 286 F. 2d 824.

JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 1961 (R. 54). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. Code, section 1254(1).

QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals erroneously refused to reopen petitioner's deportation hearing on the ground that the evidence he sought to introduce was not material, when petitioner's deportation had been sustained by the Court of Appeals because of the absence of such evidence.

2. Whether petitioner has been deprived of an adequate judicial review of the deportation proceeding against him because the Court of Appeals first affirmed the deportation order on an erroneous construction of the statute and then, by sustaining a denial of a preliminary injunction against imminent deportation, precluded review of the BIA's refusal to allow petitioner to prove that he was not deportable even under the court's construction.

3. Whether, in the light of *Rowoldt* v. *Perfetto*, 355 U. S. 115, and *Scales* v. *United States*, 367 U. S. 203, an alien is deportable solely on proof of past bare

organizational membership in the Communist Party and without evidence that the membership was a "meaningful association."

4. Whether the government has the burden of proving, or the alien has the burden of disproving, that the former membership was a "meaningful association."

STATUTES INVOLVED

Section 241(a)(6)(C) of the Immigration and Nationality Act, 8 U. S. Code, sec. 1251(a)(6)(C), provides in part:

> (a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (6) is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . .

Section 242(b)(4) of the Immigration and Nationality Act, 8 U. S. Code, sec. 1252(b)(4), provides in part:

> "No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

STATEMENT OF THE CASE

Petitioner, a Mexican national, has resided in the United States since he entered the country in 1920 at the age of 10. He is married and supports his wife, who resides in the United States. He has two American-born children and eight American-born grand-

children who live in this country. (R. 11, 23.) He was ordered deported on a finding that he had been a member of the Communist Party in 1949 and 1950, and hence was deportable under sec. 241(a)(6)(C) of the Immigration and Nationality Act, 8 U. S. Code, sec. 1251(a)(6)(C). (Exh. III, p. 30.)

The finding of past membership in the Communist Party derived from an evidentiary subfinding that petitioner had attended Party meetings and paid dues. No evidentiary findings were, or on the record could properly have been made, of any other Party activity of petitioner, of petitioner's political beliefs, or that petitioner had ever said or done anything at Party meetings.[1]

Petitioner did not testify at the deportation hearing. He took the position that under *Rowoldt* v. *Perfetto*, 355 U. S. 115, the Immigration and Naturalization Service had the burden of proving not merely a bare, organizational membership in the Communist Party, but one which constituted a "meaningful association." *Rowoldt* invalidated a deportation order against an alien who had been a dues-paying member of the Communist Party, had managed a Party bookstore, and had a degree of political sophistication and understanding of Communist theory. The evidence as to the nature of petitioner's membership was, therefore,

[1] In an opinion of May 12, 1958, the Board of Immigration Appeals described the basis for its finding as follows (Exh. III, p. 35):

> "Membership in the Communist Party was found to have been established on the testimony of government witness, Scarletto, who testified that he had collected Communist Party dues from the respondent and had attended closed meetings of the Communist Party with him and the general corroboration offered by the testimony of government witness, Elorriaga."

much barer than that as to *Rowoldt's*. Accordingly, if petitioner was right as to where the burden of proof lay, the deportation order against him was invalid because the government had proved only a nominal membership and not one that constituted a "meaningful association."

The Board of Immigration Appeals (BIA) rejected this contention and held petitioner deportable. Its theory was that once nominal membership had been shown, a meaningful association would be presumed unless the alien came forward and demonstrated the contrary. (Exh. III, pp. 36-37.)

The petitioner then brought suit in the District Court for the District of Columbia to challenge the validity of the deportation order and the BIA's theory. The District Court gave judgment for the government, and on appeal the Court of Appeals affirmed. *Gastelum-Quinones v. Rogers*, 286 F. 2d 824 (Appendix B herein).

The Court of Appeals held, on that appeal, that once bare organizational membership in the Communist Party was established by the government, the alien was deportable unless he came forward and rebutted a presumption arising from the organizational membership. To this extent the court's holding was the same as the BIA's. But where the court departed from the BIA was as to the fact which was presumed. The court's holding on this subject was novel and unprecedented.

The court reasoned as follows: (1) The statute providing for the deportation of members of the Communist Party rests on (a) a legislative finding that the Communist Party espouses violent overthrow of

the government and (b) a legislative presumption that members of the Communist Party personally espouse this doctrine of their organization. (2) Both the finding and the presumption are reasonable and valid. (3) The holding of the *Rowoldt* case was that *this presumption that members of the Party personally advocated violent overthrow* was rebuttable. (4) In petitioner's case, the government, therefore, had made a prima facie showing merely by showing voluntary organizational membership; and since petitioner had not introduced evidence that he had not personally espoused violent overthrow, the deportation order was correct.

Until this decision came down, neither petitioner nor the government had supposed, or had any basis for supposing, that it was a defense to the deportation of a former member of the Communist Party that he had not personally adhered to violent doctrine.[2] Petitioner and the government had shared the view that the crucial question was not belief in violence, but the degree of the member's involvement in Party affairs no matter how innocent.[2] Where petitioner and the government differed was on the locus of the burden of proof —whether the government had to prove the requisite degree of involvement in Party affairs, all of which might be lawful and peaceable, or whether the alien had to disprove it, once simple membership had been established.

The Court of Appeals resolved this controversy, in a sense, by holding that the burden of proof was on the alien on the issue of whether his membership was of such a kind as to be cause for deportation. But the court reached this result by the road of analyzing the

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[2] See *Galvan* v. *Press*, 347 U.S. 522; *Rowoldt* v. *Perfetto*, *supra*

statute and this Court's decisions as creating a rebuttable presumption that a member personally advocated violence. There is no way of knowing how the court would have come out on the burden of proof issue if it had realized that its premises and analysis were wrong, and that whether or not membership was deportable depended on something other than personal espousal of violent doctrine.

Petitioner then petitioned this Court for certiorari (No. 711, Oct. Term, 1960). We pointed out in the petition that the Court of Appeals had formulated a rule, never before enunciated, that deportable membership was presumed, prima facie, from a showing of bare membership, and that the alien had the burden of disproving the presumption. We asserted that this presumption was at odds with *Rowoldt;* that at the very least *Rowoldt* had not settled the question as to the locus of the burden of proof on the question of meaningful membership; that the Court of Appeals had reached its conclusion on the basis of a faulty analysis of the statutory and case law; and that it was important that the issue as to the burden of proof be settled by this Court.

The government's opposition represented—with thorough inaccuracy—that the Court of Appeals had not created any new rule of law and that all that was involved was a factual issue turning upon the evaluation of testimony. Certiorari was denied. 365 U.S. 871.

The net result was that, under the law of petitioner's case established by the Court of Appeals decision, petitioner was being deported on the basis of a rebuttable presumption that he had personally advocated

violent overthrow, although neither he nor the government had known or had reason to know that he could have rebutted this presumption, and thus established non-deportability, by showing that despite his membership he had not so advocated.

In the face of this manifest injustice, petitioner filed a motion with the Board of Immigration Appeals requesting that the deportation proceeding be reopened so as to give him an opportunity to prove that he had never advocated or espoused violent overthrow, and thus was not deportable under the view taken by the Court of Appeals in his case. He pointed out that neither he nor the Service had previously known, or could reasonably have known, that such evidence was relevant, much less crucial. He supported his motion with an affidavit that he had never advocated or espoused violent overthrow; that he had never had any knowledge or belief that such advocacy was a tenet of the Communist Party; that he had always desired that changes should be accomplished by peaceable and constitutional means; and that if the deportation hearing were reopened he would so testify. (R. 32-38)

The BIA, after hearing oral argument, denied the motion, on the ground that the evidence which petitioner offered in his motion for reopening was not material to deportability. This was inconsistent with the opinion of the Court of Appeals in petitioner's case. The BIA resolved this difficulty by refusing to believe that the court could have meant its assertions that the presumption to be rebutted was that a member espoused violent doctrine, since those assertions were contrary to this Court's decisions in *Galvan and Rowoldt*, supra. At the same time, the BIA relied on the court's de-

cision as sustaining the BIA theory that deportable membership would be presumed from a showing of bare membership, unless rebutted by the alien. (R. 30) Thus the BIA regarded the decision of the Court of Appeals as having created a rule of law—although the government had represented the contrary in its opposition to certiorari.

The BIA also rejected petitioner's argument that the case should be reopened because of the light thrown on the meaning of membership in the Communist Party by *Scales* v. *United States*, 367 U.S. 203, decided after the Court of Appeals had issued its decision in petitioner's case (R. 30-31). In Scales, this court interpreted the membership clause of the Smith Act to mean "active" membership, citing as precedents the deportation cases of *Rowoldt* and *Galvan*, supra.

Petitioner then filed the complaint which initiated the present litigation, challenging the validity of the BIA's denial of his motion to reopen (R. 11-15). The District Court denied a preliminary injunction (R. 48) and the Court of Appeals summarily affirmed the denial without opinion. (R. 54) The affirmance was by the same two-judge panel that had decided the earlier case.

REASONS FOR GRANTING THE WRIT

I. As a result of a confusion of the Court of Appeals, contributed to by neither party to the litigation, petitioner and his family face the cruelty of his exile from the country where he has resided since childhood, although the following circumstances exist:

(a) The deportation order is probably erroneous.

(b) The deportation order was sustained by the Court of Appeals on the basis of an erroneous legal analysis made by the Court *sua sponte*.

(c) Petitioner has been denied the opportunity of proving that he is not deportable even under the court's erroneous theory because the BIA relied on that part of the court's decision which favored the government while rejecting as incredible that part which favored petitioner.

When petitioner's deportation case first came to the Court of Appeals, the question involved was one which arose out of, but had not been settled by, *Rowoldt* v. *Perfetto*, 355 U.S. 115. *Rowoldt* held that not every past member of the Communist Party was a "member" for the purpose of the Communist deportation statute. Previously, *Galvan* v. *Press*, 347 U.S. 522, 527, 529, had stated that "nominal" members were not deportable. *Rowoldt* held membership to be a cause for deportation only if the alien member had engaged in Party activities which made his membership a "meaningful association." It is clear from *Rowoldt*, as well as from *Galvan and Harisiades* v. *Shaughnessy*, 342 U.S. 580, that the activity establishing deportability need not indicate the alien's personal commitment to violent doctrine. As stated in *Scales* v. *United States*, 367 U.S. 203, 223, ftn. 15, which transferred the *Rowoldt* concept to the Smith Act's membership clause:

> "The element of 'activity' in the proscribed membership stands apart from the ingredient of guilty 'knowledge' in that the former may be shown by a defendant's participation in general Party affairs, whereas the latter requires linking him with the organization's illegal activities."

In *Scales* (at 255, ftn. 29), the Court affirmed a trial court instruction that for the purposes of the Smith Act Communist Party membership

> "must be more than a nominal, passive, inactive, or purely technical membership. In determining whether he was an active or inactive member, consider how much of his time and efforts he devoted to the Party. To be active he must have devoted all, or a substantial part, of his time and efforts to the Party."

And in *Nyukkanen* v. *McAlexander*, 265 F. 2d 825, 828, aff'd 362 U.S. 390, the Ninth Circuit observed:

> "The precedent value of Rowoldt, then, is not to be derived from an undue emphasis upon the words 'meaningful association,' as used in that opinion. Rather, it is to be gained by comparing the evidence of membership which was there found to be insufficient with that contained in the record of the case under consideration."

The evidence credited by the BIA amounted to nothing more than petitioner's attendance at some closed Party meetings and payment of Party dues in 1949 and 1950. This was far less evidence of significant membership than existed in *Rowoldt*. (See *supra*, p. 4.) Still less did it meet the *Scales* test that a person was more than a passive or technical member only if he devoted a substantial part of his time and efforts to the Party.

The BIA nevertheless sustained the deportation, on the theory that once nominal membership had been shown, the burden of proof shifted to the alien. The question before the Court of Appeals on the first review was whether this theory was correct. Although

language in *Rowoldt* points to a negative answer, the question was novel, having never been determined before by this Court or another Court of Appeals.

On principle, the BIA position was unsound. The burden of proving that a resident alien is within a deportable class is squarely on the government. See *Kimm* v. *Rosenberg*, 363 U.S. 405, 412-413 (dissenting opinion); *Chew* v. *Rogers*, 257 F. 2d 606; *Zito* v. *Moutal*, 174 F. Supp. 531, 538. The deportable class in this instance is a member whose membership was a "meaningful association." A presumption that membership entailed such an association is supported by neither experience nor logic, particularly under the *Scales* and *Rowoldt* standards of what constitutes the necessary association. To the contrary, in view of the resources at the command of the government and its well-known close surveillance of the Communist Party, the government's inability to prove more than mere organizational membership in a given case indicates that there was nothing more to prove. Moreover, a finding of deportability may not be rested on mere inference, in view of the provision in section 242(b)(4) of the Immigration and Nationality Act, 8 U. S. C. 1252(b)(4), that, "No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."

The Court of Appeals, in sustaining the deportation order on its first review, missed all the relevant considerations. Instead of deciding whether a sufficiently active membership to be a "meaningful association" could be inferred solely from mere organizational membership, it reasoned that Congress had intended that a personal addiction to violence be inferred from such membership. It held, therefore, that petitioner was

deportable because he had failed to introduce proof that he had no such addiction. This decision was based on what is obviously a thoroughly mistaken analysis of the relevant statutory and case material.

Neither petitioner nor the government knew, or could have been expected to know, that the crucial issue of deportability was whether petitioner personally espoused doctrines of violence. Thus petitioner was held deportable by the court for failure to prove something which he had never had an opportunity to prove.

The petitioner, therefore, was on sound ground in his motion to reopen the proceeding. The BIA's denial of the motion adopted the impermissible technic of relying on that part of the court's opinion which supported deportation, while rejecting the part which supported the motion to reopen.

When the case came back to the Court of Appeals, it should have done one of two things. The technically correct course would have been to reverse the BIA for its failure to apply the law of petitioner's case as established by the court's opinion. As stated in *Thompson* v. *Maxwell Land Grant & Ry. Co.*, 168 U.S. 451, 456:

> "It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case.
>
> * * * * *
>
> We take judicial notice of our own opinions, and although the judgment and the mandate express the decision of the court, yet we may properly

> examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered, and what has become settled for future disposition of the case."

As a second possibility, the court, having realized that its analysis and theory on the first review were erroneous, might have reexamined the validity of the deportation order in the light of correct premises and the intervening decision in *Scales*, and then issued an opinion setting straight its original opinion and meeting the issue on sound grounds.

The court, however, took neither of these two courses. Instead, summarily and without explanation it affirmed the BIA's refusal to reopen. Thus it acted inconsistently with the law which it had established for the case, but simultaneously failed to reconsider or articulate what should be the law of the case. For all practical purposes, petitioner, though twice before the Court of Appeals, has been denied an adequate judicial review.

2. The court's inconsistent actions leave this field of deportation law in a state of uncertainty and ambiguity. On the basis of the court's reported opinion, issued on the first review of petitioner's deportation, aliens charged with Communist Party membership will naturally suppose that a crucial issue in the deportation proceeding is whether they personally espoused violence. Yet the immigration authorities, fortified by the court's unreported decision on the second review, have adopted and will apply a rule of law that this issue is immaterial.

3. The presumption which the immigration authorities are applying, and which they now consider judi-

cially blessed by the strange course of this litigation, has still not received a sound judicial examination. Yet, for reasons already stated, the BIA's rule seems clearly wrong. This error is being perpetuated in aid of the enforcement of a statute which impinges on human rights, whose harshness and unfairness were noted in the very decision which sustained it (*Galvan v. Press, supra*, at 530), and "whose constitutionality was upheld here only on historical grounds" (*Kimm v. Rosenberg, supra*, at 115, dissenting opinion). The Court should not confirm by default a presumption created by the BIA which expands the statute's cruel and purposeless results.

CONCLUSION

Certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,552

JOSE MARIA GASTELUM-QUINONES, *Appellant*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, *Appellee*.

Before: DANAHER and BASTIAN, *Circuit Judges*, in Chambers.

Order

Upon consideration of appellant's motion for stay of deportation pending appeal and of appellee's opposition and of appellee's motion to affirm the judgment of the District Court, of appellant's opposition and of appellee's reply, it is

ORDERED by the court that the motion for stay of deportation is denied and that the judgment of the District Court appealed from herein is affirmed.

PER CURIAM

Dated: SEP. 13, 1961

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,429

JOSE MARIA GASTELUM-QUINONES, *Appellant*

v.

WILLIAM P. ROGERS, Attorney General of the United States, *Appellee*

Appeal from the United States District Court for the District of Columbia

Decided December 8, 1960

Mr. David Rein, with whom *Mr. Joseph Forer* was on the brief, for appellant.

Mr. Gilbert Zimmerman, Special Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee.

Before, EDGERTON,* DANAHER and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge*: This is an appeal from a judgment of the District Court dismissing appellant's [plaintiff's] complaint for review of an order of deportation issued by the Board of Immigration Appeals [Board]. The order complained of was issued pursuant to authority delegated to the Board by the Attorney General under § 241(a)(6), of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(6), which reads in pertinent part:

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* Judge Edgerton took no part in the consideration or decision of this case.

"(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

. . . .

"(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

. . . .

"(C) Aliens who are members of . . . the Communist Party of the United States . . . ."

Appellant, a Mexican national, first entered the United States in 1920 and has resided here since that time. On February 28, 1957, a special inquiry officer of the United States Department of Justice, Immigration and Naturalization Service, after hearing on a rule to show cause issued March 23, 1956, found that, after his aforementioned entry into the United States, appellant was a voluntary member of at least two units of the Communist Party of the United States in Los Angeles, California. At the hearing, although voluntarily placed under oath, appellant, upon advice of counsel, invoked the Fifth Amendment and refused to testify. Appellant was accordingly ordered deported.

On November 14, 1957, the Board, to which appellant had appealed, ordered the appeal dismissed on the basis of the testimony before the special inquiry officer and his findings. The Board, in the appellate proceeding, stated that appellant was represented by able counsel, who was given the widest latitude in conducting his defense. Reviewing the testimony, the Board said:

"Counsel contends the record does not establish that respondent's membership was voluntary. The testimony introduced by the Government reveals that the respondent's membership continued over a period from late 1948 or early 1949 to at least the end of 1950; that for several months, an attempt was made

to make the respondent a leading figure in a unit of the Communist Party; that the respondent paid dues over the period of his membership; and attended many meetings closed to all but members of the Communist Party. This testimony establishes a prima facie case of voluntary membership. The respondent made no attempt to rebut this prima facie case. He did not assert that the membership was involuntary. We believe this record establishes that respondent's membership was voluntary."

We think the record amply supports this finding.

About one month later, on December 9, 1957, the Supreme Court rendered its decision in *Rowoldt* v. *Perfetto*, 355 U.S. 115 (1957). On the basis of that decision and at appellant's request, the Board reopened the case so that, in the Board's words, "[appellant] will be permitted to present such evidence as may be appropriate [to place his case within the framework of Rowoldt]."

All that occurred at the reopened hearing before the special inquiry officer was that appellant's counsel made a statement to the effect that the evidence of record did not establish the "meaningful association" adverted to in *Rowoldt*, that a *prima facie* case did not exist and, therefore, that it was unnecessary to offer any further evidence. Accordingly, appellant again did not take the stand nor offer any evidence.

After the second and abortive hearing, the special inquiry officer filed his second opinion, calling attention to the fact that appellant had refused to testify during the original hearing, on a claim of privilege, and added:

"Although the respondent's motion requested reopening of the proceedings to offer testimony which he alleged would place him within the framework of *Rowoldt*, and despite the fact that the Board of Immigration Appeals granted the reopening for said pur-

pose, the respondent failed to testify, to offer any documentary evidence, or to present any witnesses at the reopened hearing."

Calling attention to the fact that, despite the reopened hearing, the sum total of the evidence of record was exactly the same as it was when the decision of February 28, 1957, was entered and that the only new development was the Supreme Court's *Rowoldt* decision, the special inquiry officer proceeded to compare *Rowoldt* with the instant case, holding them to be clearly distinguishable, quoting from the decision of the Board in ordering reopening of the case as follows:

"In the instant case, however, the situation is quite different. Neither by testimony at the hearing nor as in Rowoldt's case by statements under oath prior to the hearing has the respondent given information which would challenge the normal inference which would flow from the fact that one who joined a political party, joined knowing that it was a political party. When the respondent registered as an alien in 1940, he stated that he had not belonged to any clubs, organizations or societies (Exhibit 3). When questioned in 1953 prior to hearing, concerning membership in the Communist Party, he refused to answer. During the five hearings which were held from April 13, 1956 to July 9, 1956, he never admitted having been a member of the Communist Party but sat by silently while his counsel attacked the testimony of the witnesses who stated that *he had been a member of the Communist Party*. Quite different then is the situation in the instant case from that in *Rowoldt* where unchallenged testimony accepted by the authorities presented a record at the most so balanced that it permitted the inference that Rowoldt's affiliation with the Communist Party may well have been wholly devoid of any political implications. This type of a

balanced record is not presented in the instant case. Here we have nothing to prevent the drawing of the norinal inferences which flow from the joining of a political party and long association with it. Moreover, Rowoldt joined at a time when it meant to him getting something to eat, something to wear and a place to 'crawl into.' This element tended to place the case in a state of balance for it made questionable the validity of drawing the inference which normally follows from the joining and association with a political party. The respondent's membership on the other hand was at a time when economic conditions did not require the individual to join in mass effort to obtain the simple necessities of life. (See *Schleich* v. *Butterfield*, 252 F. 2d 191, C.A. 6, February 14, 1958)"

The special inquiry officer, therefore, reaffirmed his original findings of fact and conclusions of law and, there being no request for discretionary relief, again ordered deportation. The appeal taken from that order was dismissed by the Board on May 18, 1959, the Board concluding its opinion as follows:

"Both side are content to rest upon the record. The record establishes membership. We believe it establishes meaningful membership. Our previous opinion has set forth our reasoning. The appeal will be dismissed."

Thereupon, appellant filed in the District Court his complaint for review of the deportation order, and for declaratory judgment and injunctive relief. On cross motions for summary judgment, the Board's motion for summary judgment was granted, that of appellant was denied, and the complaint was dismissed. This appeal followed.

Appellant's principal contention is that *Rowoldt* established a concept of "meaningful association" which requires the Government to show something more than mere membership in the Communist Party before a deportation order can validly be issued. In considering this contention, involving as it does the meaning of a recent Supreme Court decision, a brief study of the development of the present law will be helpful.

It is well settled that an alien who is in the United States must be afforded procedural due process before he may be constitutionally deported. *Ng Fung Ho v. White*, 259 U.S. 276 (1921), *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1947). Under the Alien Registration Act of 1940, 54 Stat. 670, the pertinent ground for deportation was advocacy of the overthrow of the United States Government by force and violence. This ground was upheld as consistent with due process in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1951). Under the Act of 1940 it was necessary in each deportation case involving membership in the Communist Party to prove that the individual advocated overthrow of the government by force and violence. The position of the Communist Party itself was immaterial.

The Internal Security Act of 1950, 64 Stat. 987, 1006, 1008, dispensed with the need for proving, in each individual case, that an alien involved advocated overthrow of the government by force and violence, and made Communist Party membership the test. The Supreme Court upheld this lessened burden of proof as constitutional in *Galvan v. Press*, 347 U.S. 522 (1954). In *Galvan* the Court placed great emphasis on a detailed legislative finding, contained in §2(1) of the Act that:

> "[The] Communist movement . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to

establish a Communist totalitarian dictatorship . . ." At page 529.

The section here involved was then in effect in its present form. The Court held that the word "member" as used in 8 U.S.C. § 1251(a)(6)(C), the section involved here, was not limited to those "members" of the Communist Party who are fully cognizant of and who endorse the Party's advocacy of violence.

> "It must be concluded . . . *that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joing an organization known as the Communist Party which operates as a distinct and active political organization*, and that he did so of his own free will." [Emphasis supplied.] Galvan v. Press, *supra*, at page 528.

In *Galvan* the Supreme Court also mentioned that, "Petitioner does not claim that he joined the Party 'accidentally, artificially, or unconsciously in appearance only . . .'" thus lending inferential support to the Government's view that the burden is on the alien to show that his Party membership was something other than bare organizational membership.

Under the 1940 Act, membership in the Communist Party was not a ground for deportation, but actual personal advocacy of the overthrow of the government by force and violence was. Under the present Act as interpreted by *Galvan* actual personal advocacy of the overthrow of the government by force and violence is not a prerequisite to deportation; it is enough for the Government to show membership in the Communist Party.

It seems to us that the detailed legislative finding contained in § 2(1) of the 1950 Act and quoted *supra* makes

the latter ground consistent with due process. The legislative finding merely states that the Communist Party as a political organization is devoted to the overthrow of the Government of the United States by force and violence, the ground upheld by *Harisiades* v. *Shaughnessy*, *supra*. The present Act then applies to membership in the organization a presumption of espousal of the doctrines of the organization. Advocacy of the overthrow of the Government by force and violence is attributed to the subject of the deportation proceeding by (1) proof of membership in the Communist Party, (2) the legislative finding of the nature of the Party, and (3) the presumption that a member of a political organization espouses the tenets of the organization.

In *Rowoldt* the evidence of membership in the Communist Party came from the alien himself who, at the same time, offered an explanation of that membership which, if believed, completely refuted any theory of advocacy of the overthrow of the Government by force and violence. There was no contrary evidence. In that context the Supreme Court spoke of the "meaningful association" required by the statute. We do not think that *Rowoldt* was in any sense a reversal or limitation of *Galvan*. Rather, we think that *Rowoldt* amplified the presumption of support which the statute draws from the bare fact of membership by making that presumption rebuttable.

Therefore we think that the statutory scheme which was upheld in *Galvan* was only explained and not reversed by *Rowoldt* and remains in effect. Since the presumption of espousal of the basic tenets of an organization derived from the fact of membership is rebuttable, the burden is on the alien to come forward with an explanation, the Government having made a *prima facie* case by proving voluntary membership. We think that the findings of the Board that appellant's Party membership was meaningful is established by the record, and

since appellant here failed to offer any evidence whatsoever, the presumption must stand.

We add that the Board "did not draw any inference from the fact of appellant's silence that his testimony would have been adverse to him if given." Nor have we drawn an inference. Whether such an inference may be drawn we need not, under the circumstances of this case, determine. The judgment of the District Court is

Affirmed.